

Appendix C

LEGAL FRAMEWORK OF STATE FOREST TRUST LANDS

FEDERAL LAND GRANT TRUSTS

Federal land grant trusts are endowments of land by the United States to the state of Washington to be sold, leased or managed to support designated beneficiaries in perpetuity.

The Federal grant lands were granted in 1889 to Washington in the Congressional Enabling Act providing for admission of the territory of Washington as the 42nd state. These granted lands were expressly reserved in the Act for the following purposes: support of the common schools; construction of public buildings for legislative, executive and judicial use; for a state university (University of Washington); the use and support of an agricultural college (Washington State University); the establishment and maintenance of a scientific school (Washington State University); for state normal schools (now regional universities); and for state charitable, educational, penal and reformatory institutions.

These lands are held in trusts for the various beneficiaries. The Washington State Legislature has designated the Department of Natural Resources as manager of these trust lands. Of the five million acres currently in the trust, approximately 2.1 million acres are covered by this Forest Resource Plan.

FOREST BOARD TRUSTS

Forest Board trusts are forest lands acquired by the state by gift, purchase or transfer by the county to perpetuate the forest resource in Washington.

There are two types of Forest Board properties: 1) Forest Board Transfer land; and 2) Forest Board Purchase land. Forest Board Transfer lands are tax-title (See Glossary) lands that the legislature by statute directed each county to transfer to the state to be managed as state forest lands. Forest Board Purchase lands are lands gifted to the state or purchased by the Board as authorized by law to be managed as state forest lands. Forest Board lands may not be sold. The legislature has directed that Forest Board Transfer Lands and some Forest Board Purchase lands be held in trust and administered and protected as other state forest lands.

The nature of the Forest Board "trust" has recently been the subject of judicial review. In County of Skamania v. State, 102 Wn.2d 127, 685 P.2d 576 (1984), the court held that RCW 76.12.030 imposes upon the state fiduciary duties similar to those imposed upon it by the Enabling Act.

THE WASHINGTON STATE ENABLING ACT

The Congressional Enabling Act of 1889, which admitted Washington to the Union, put limits on the sale, lease and management of trust lands. This Act has been amended by Congress on numerous occasions.

Trust lands may be disposed of only at public sale, and at fair market value. Trust lands may be exchanged for lands of equal value and as near as possible to equal area. Mineral, hydroelectric power development and grazing lands may be leased pursuant to regulations set forth by the legislature.

THE WASHINGTON CONSTITUTION

The Constitution of the state of Washington further limits and directs the sale, lease and management of federal land grants. According to the constitution, trust lands may not be disposed of unless the fair market value is paid or safely secured to the state. They may be sold only at public auction to the highest bidder. No more than 160 acres may be sold in one parcel. Land inside or within two miles of an incorporated city and worth more than \$100 an acre must be platted. Such lands may not be sold in larger than five-acre blocks; only one block per parcel may be sold.

Article IX of the constitution establishes the Common School Fund and the Common School Construction Fund. The Common School Fund is permanent and irreducible. Its varied sources include the principal of all funds gained from sale of Common School grant lands. Revenue from the Common School fund is applied to support Common Schools. The Common School Construction Fund consists of proceeds of the sale of timber and other crops from Common School grant lands and other sources. This fund is used to finance construction of common school facilities. Funds surplus to construction needs may be used for general support of the common schools.

Article XVI of the state constitution provides that all public lands granted to the state are held in trust for all the people. This provision must be interpreted in the context that Congress intended. The designated beneficiaries must derive the full benefit of the grant. County of Skamania v. State, 102 Wn.2d 127, 685 P.2d 576 (1984). Lassen v. Arizona, 365 U.S. 458 (1967).

WASHINGTON STATE LEGISLATION

The legislature has directed the department of Natural Resources, as the manager of trust lands, to observe basic standards. These include statutes relating to multiple use, sustained yield, and transfer of lands out of trust status.

Multiple Use

The 1974 Legislature directed the department to use the concept of multiple use management where it is in the best interests of the state and the general welfare of the citizens, is consistent with the trust provisions of the lands involved, and is compatible with activities necessary to fulfill the financial obligations of trust management.

Multiple uses may include recreation, educational or scientific use, maintenance of rights of way, greenbelts, scenic and historic areas, and watershed protection. Educational or scientific use includes such use by students of educational institutions which are also designated beneficiaries of specific trust lands. These uses will be allowed to the extent they are compatible with trust obligations.

Sustained Yield

In the Multiple Use Act, ch. 79.68 RCW, the legislature directed the department to manage those state-owned lands under its jurisdiction capable of growing forest crops on a sustained yield basis when compatible with other legislative directives. To this end, the department will periodically adjust acreages designed for inclusion in the sustained yield management program. "Sustained yield," as defined by statute, means forest management to provide continuing harvest without prolonged curtailment or cessation.

Transfer from Trust Status

The legislature has established procedures to transfer federally granted trust lands to general public uses. In each situation, the affected trust must be compensated for the fair market value of the land. These are contained in RCW Title 79.

GENERAL STATUTES

Congress and the legislature have set forth many other general statutes governing use and management of land, including environmental laws. Federal environmental laws include the Clean Water Act, 33 USC (1251-1387, Clean Air Act of 1973, 42 U.S.C. 7401, *et seq.*, and the Endangered Species Conservation Act of 1973, 16 U.S.C. 1531, *et seq.*) State environmental laws include the State Environmental Policy Act, ch. 43.21C RCW, the Forest Practices Act, ch. 76.09 RCW, the Hydraulics Act, RCW 75.20.100, the State Water Pollution Control laws, ch. 90.48 RCW, the Shoreline Management Act, ch. 90.58 RCW, and the Surface Mining Act, ch. 78.44 RCW. Recognizing the principle that laws duly passed by the legislature are presumed valid, the department follows general statutes which are applicable to state agencies.

The federal Clean Water Act, 33 U.S.C. 1251, *et seq.*, establishes numerous provisions relating to research, federal grants for water pollution control planning and other activities, water quality standards, and regulation of pollution discharge. Generally, the State Forest Practices Act regulations, discussed later in this section, provide the means by which forestry activities, including those undertaken by the department, comply with the Clean Water Act. These regulations have been certified by the Federal Environmental Protection Agency (EPA) as "best management practices" as part of EPA's approval of the state areawide waste treatment management plan under 33 U.S.C. 1288.

The federal Clean Air Act, 42 U.S.C. 7401, *et seq.*, establishes provisions relating to air quality standards, emission controls, methods of achieving attainment or preventing deterioration, and protection of visibility. The principal impact of this act is on the department's burning activities for silvicultural purposes. The department administers the Washington State Smoke Management Program, a cooperative effort of state and federal agencies. In managing trust lands, the department must obtain necessary permits and comply with the program and those laws regulating burning. The Federal Endangered Species Act, 16 U.S.C. 1531, *et seq.*, with some stated exceptions, prohibits specific acts relating to endangered and threatened species designated under the Act. The department, in managing the trust lands, abides by this Act by planning its timber sales and other land use decisions in compliance with the act.

The State Environmental Policy Act (SEPA), RCW Ch. 43.21C, directs that, to the fullest extent possible, policies, regulations and laws of Washington are to be interpreted and administered in accordance with the policies set forth in SEPA. All branches of government, including state agencies, are to follow the guidelines and procedures specified in RCW 43.21C in planning and decision-making. The department, as a state agency, must comply with the requirements of SEPA.

The Forest Practices Act, RCW ch. 76.09, creates a comprehensive statewide system of laws and regulations governing forest practices on private and public lands. The forest practices regulations establish minimum standards for forest practices. The department must comply with the Forest Practices Act. Forest practice regulations relating to water quality promulgated by the Department of Ecology and the Forest Practices Board also afford compliance with water pollution control laws.

The Shorelines Management Act of 1971, RCW ch. 90.58, administered by the state Department of Ecology, declares it a state policy to provide for the management of shorelines of the state by planning for and fostering all reasonable and appropriate uses. A permit system is the main vehicle for enforcement of the Act. Local government administers the permit system and local master programs approved by the Department of Ecology. In practice, when the department conducts a management activity on trust land which falls within the purview of the Act, it obtains a permit if a permit is required.

The Hydraulic Approval Act, RCW ch. 75.20, is part of the fisheries code. The Act requires that a person or government agency desiring to construct any form of hydraulic project or other work that will use, divert, obstruct or change the natural flow or bed of any river or stream, or that will use any of the waters of the state or materials from the streambed, may not commence such activity without approval from the Departments of Fisheries or Wildlife, as appropriate. Under the Hydraulic Approval Act, if the department conducts any activity on trust lands which falls within the Act's purview, it must first obtain a permit. Similarly, purchasers of state timber sales which include activities falling within the scope of the Act, must first obtain hydraulic approval.

The Surface Mining Act, RCW ch. 78.44, is administered by the department as part of its overall regulatory function. The Act requires an operator to obtain a permit from the Department before engaging in surface mining. This Act affects management of trust lands in that it requires an operator who has authority to conduct surface mining on trust lands to obtain a permit before engaging in the surface mining activity.

COMMON LAW DUTIES OF THE TRUSTEE

The duties of a private trustee have been described in various ways and include: a duty to administer the trust in accordance with provisions creating the trust, a duty of undivided loyalty to the beneficiaries, a duty to manage trust assets prudently, a duty to make the trust property productive without unduly favoring present beneficiaries over future beneficiaries, a duty to reduce the risk of loss to the trusts, and a duty to keep and render accounts. Several of these duties have been discussed by the courts specifically in the context of federal land grant trusts.

CASE LAW PERTAINING TO FEDERAL LAND GRANT TRUSTS

Five cases show how the courts have applied some of the above principles to the sale, lease and management of federal grant trust lands.

In Ervien v. United States, 251 U.S. 41 (1919), the U.S. Attorney General sued for an injunction to prevent the New Mexico Land Commissioner, acting as trustee of New Mexico grant lands, from spending trust earnings for unauthorized purposes: to publicize the resources and advantages of New Mexico.

The New Mexico Land Commissioner argued that this advertising was a proper administrative expense because it could increase the value of the trust lands. The U.S. Supreme Court, however, granted an injunction prohibiting these expenditures. It ruled that the trusts were individually created to support public institutions specified in New Mexico's Enabling Act. Therefore, the trustee could not use proceeds from a specific trust to benefit the state generally, even if the trust also might be indirectly benefited. The Court held that Congress intended that the trustee apply the trust earnings to the fund created to "support" the public institution designated in the Enabling Act.

In Lassen v. Arizona, 385 U.S. 458 (1967), mentioned above, the Arizona Highway Department sued the Land Commissioner, as the trustee of grant lands, to condemn a highway right of way. The Arizona department argued that it need not compensate the trust because a highway across trust lands would enhance the value of remaining trust lands in an amount at least equal to the value of the trust lands taken. The U.S. Supreme Court rejected the argument and agreed with the Commissioner that the department must pay the trust for the property taken.

The Court in Lassen stated:

The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value" and that "no sale or other disposal . . . shall be made for a consideration less than the value so ascertained . . ." . . . Second, it imposes a series of careful restrictions upon the use of trust funds. As this Court has noted, the Act contains a "specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose." Ervien v. United States, 251 U.S. 41,47.

The Court continued:

The Act thus specifically forbids the use of "money or thing of value directly or indirectly derived" from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts, and directs with great precision their administration.

"Words more clearly designed . . . to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen." United States v. Ervien, 246 F. 277, 279. All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust.

See also ASARCO, Inc. v. Kadish, 490 U.S.605 (1989).

United States v. Ill.2 Acres of Land in Ferry County, Washington, 293 F. Supp. 1042 (E.D. Wash. 1968), aff'd 435 F.2d 561 (9th Cir. 1970) (per curiam), is a Washington case adopting the principles set forth in Ervien and Lassen. The United States government sought to acquire state school trust lands for a federal irrigation project. The United States argued that, as trust grantor, it was permitted to take the land without paying for it. The court disagreed stating:

The school lands provisions of the Enabling Act further a liberal policy of school support . . . In this context the principle of indemnity requires that no land or proceeds be diverted from the school trust unless the trust receives full compensation. This principle is explicitly a part of the Washington Enabling Act.

The district court concluded that donating school trust lands to the United States would constitute a breach of trust by the trustee (state of Washington). The court ordered the United States to pay the trust the full market value of the land.

In State v. University of Alaska, 624 P. 2d 807 (1981), the state of Alaska sought to include university grant land within Chugach State Park. The university opposed this action and sought a declaratory judgment as to whether the land could be used other than to support the University.

The Alaska Supreme Court ruled for the University, stating:

Because the land was to be held in trust for the university, we must determine whether inclusion of the land in Chugach State Park caused a breach of the trust. The trial court concluded that the inclusion of university land in the park violated the trust provision of the federal grant. We agree. The use that can be made of park lands as compared to state lands in general is severely restricted. Trees may not be cut, minerals may not be removed, nor can the land be used for raising farm animals. The general principle is that park lands are to be managed in a way that will increase the "value of a recreational experience."

It is apparent that this objective is incompatible with the objective of using university land for the "exclusive use and benefit" of the university. The implied intent of the grant was to maximize the economic return from the land for the benefit of the university. This intent cannot be accomplished if the use of the land is restricted to any significant degree.

In 1984, the Washington State Supreme court addressed the trust relationship in County of Skamania v. State of Washington, 102 Wn.2d 127, 685 P.2d 576.

In Skamania, the court, relying in part on the decisions discussed above, struck down the Forest Products Industry Recovery Act. The Recovery Act permitted purchasers of timber from federal grant lands to default on their contracts or to modify or extend their contracts without penalty. The court held that the legislation was a breach of the state's fiduciary duty as a trustee to act with undivided loyalty to the trust beneficiaries. The court stated that:

[T]he Act provides direct, tangible benefits to the contract purchaser at the expense of the trust beneficiaries . . .

We think the Act falls far short of the State's constitutionally imposed duty to seek "full value" for trust assets. The conclusion is inescapable that the primary purpose and effect of this legislation was to benefit the timber industry and the state economy in general, at the expense of the trust beneficiaries. This divided loyalty constitutes a breach of trust.

Our holding is consistent with a host of cases from other jurisdictions involving school trust lands. To our knowledge, every case that has considered similar issues has held that the State as trustee may not use trust assets to pursue other state goals. Skamania, 102 Wn.2d at 136-07.

The court also discussed a trustee's duty to manage trust assets prudently. This duty includes using reasonable prudence in pursuing contract claims as well as seeking the best possible price for the assets. The Washington court in Skamania relied in part on Lassen v. Arizona ex rel Ariz. Hwy. Dept. 385 U.S. 458 (1967) to conclude the state of Washington breached its duty to act prudently by releasing valuable contract rights. Skamania, 102 Wn.2d at 138.

CONCLUSIONS FROM THE LEGAL BACKGROUND

The Enabling Act and Washington Constitution create express trusts: The United States is the grantor; Washington State is the trustee; certain schools and other designated entities are the beneficiaries. The Congressional intent and purpose in creating these trusts has been construed by the United States Supreme Court to be as follows: The trustee is to sell or manage the granted lands exclusively for the support of the public institutions designated in the Enabling Act. In doing so, it acts as a fiduciary. Additional management direction comes from the Washington State Legislature, which has the authority to pass laws governing trust management. Such laws are presumed to be valid. Forest Board trust lands are to be managed in a similar manner.